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Walter Olsen

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TORTIFICATION OF CONTRACT LAW: DISPLACING CONSENT AND AGREEMENT

Walter Olsen †

One of the consequences of recent world events is the impending demise of jokes about communism. For the record, I would like to preserve the one about the veteran party leader who is haranguing the troops—this is before they have taken over—and tells them: “After the revolution, comrades, everyone will dine on strawberries and cream.” A hand goes up at the back of the room. It is a new recruit. “But comrade,” he says, “I don’t like strawberries and cream.”

The leader explains that strawberries and cream is a wholesome and natural dish, universally recognized as a tasty treat, even written up in poetry. He argues very systematically, but the man at the back is unconvinced. “Well, I don’t know why,” he says, “but I just don’t care for them.” At which point the leader loses patience: “Rest assured, comrade, that after the revolution you *will* like strawberries and cream.”

That is what is called paternalism. It is not confined to any one movement or part of the political spectrum. It tends to crop up wherever utopian ideas are found, and is even found in something as far from communism as the American court system.

The paternalist project for our civil courts runs something as follows. After the revolution—which perhaps has already taken place—the average citizen will enjoy a vast array of wonderful new rights to sue other people. You will be empowered to haul your neighbors and fellow citizens to court if you feel they have fallen short of good faith and fair play. You will be entitled to sue them for unlimited damages, punitive as well as compensatory, even over behavior that had previously been thought not subject to liability at all. Everyone will be under a vague but stringent obligation to look out for your safety and welfare, enforceable by legal action. You will enjoy a cornucopia of contention opportunities, a smorgasbord of suing options, a Lotus-land of litigability.

At this point you may raise your hand, like the recruit, to say that you are not sure you want all these new benefits. You may not

† Walter Olsen is a senior fellow at the Manhattan Institute. He is the author of *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991) and editor of *NEW DIRECTIONS IN LIABILITY LAW* (1988).

want to keep others terrified about how and when they can be sued for dealing with you. You may disagree with the courts' current definition of what is negligent or defective or unreasonable in others' behavior. You may, in short, be inclined to stamp your new legal entitlements "return to sender." But you are out of luck. You will find that many of your rights to sue, like the strawberries and cream, cannot be waived. The rights are grounded not in traditional contract law but in the principles of tort law. They are undisclaimable.

We know the basic differences. Tort law is modeled on the one-sided, gratuitous infliction, as when a stranger drives into your front porch and demolishes it. Nothing is pre-arranged or arrangeable; nothing is of mutual benefit. In a contract situation, your front porch is still ruined, but it is because an incompetent renovator has gotten his hands on it. Tort law is seen as externally imposed; it may reflect what some call natural law, or society's arbitrary decision of who should be responsible for what, but in any case it reflects something other than the choice of the parties. Contract obligations are seen as a product of agreement. Tort law may in some sense reduce itself to: "because we say so"—we being society as a whole or judges or juries. Contract law is supposed to be: "because *you* said so."

Other distinctions are familiar as well. In tort cases one can typically ask for punitive damages and damages for such hard-to-measure things as pain and suffering, humiliation, and emotional distress. In contract law, the assumption is that absent some signal to the contrary, the parties will not make such demands on each other. The idea is that both sides have tacitly agreed to disarm themselves of the most intimidating legal weaponry as a condition of doing business, even as gunslingers are supposed to check their weapons on entering the saloon.¹

That was then. More recently, in what has been called the tortification of contract law, courts have begun to treat more and more consensual interactions as if they were, in part or whole, gratuitous inflictions of harm. The machinery and weaponry of tort law, including notions of punishment and open-ended damage calculations, are displacing the notion of consent and agreement.

Consider what happened after first baseman Leon Durham hit a foul ball into the stands at a Chicago Cubs baseball game. The ball struck Delbert Yates, Jr., who sued. The admission ticket to the ball

¹ The ban on penalty clauses in contracts, which forces contracting parties to resort to bonding and other stratagems when they want to arrange matters so as to penalize one party for noncompliance, can be seen as an even clearer statement of the law's assumption that, absent strong evidence to the contrary, people will deal with each other only on an understanding not to sue for each other's punishment.

park specifically disclaimed liability for any such event. Additionally, the tradition in baseball is against plaintiff recovery for foul balls, with or without disclaimer.² Still, a Cook County circuit court allowed recovery.³ The ticket made no difference, and apparently would have made none even if Yates had signed it and had it notarized.

In the mortgage world, lenders in Oklahoma and other states are currently faced with a remarkable new judicial innovation inelegantly called the "cramdown." The situation arises when a borrower is bankrupt but is trying to stave off foreclosure. The value of the house has fallen sharply since it was financed. The borrower asks that part of the mortgage simply be amputated to reflect the decline in the value of the house, whereupon the borrower will resume payments on the smaller amount. The court agrees, sometimes, and orders this.⁴ As a borrower's attorney put it, "If the lender makes a stupid loan, why shouldn't he pay for it?" To which the old reply would have been: "Because your client promised he would not."

Similar trends are seen in employment law, in landlord-tenant law, in insurance law, and so forth. More obligations have been made undisclaimable, more exculpatory clauses have been struck down as unconscionable, more duties have been grounded in public policy rather than the evident agreement of the parties.

One of my least favorite cases along these lines comes from the investment world. Discount stock brokers, who do not maintain research staffs or commissioned salespeople, have been thriving in recent years. To many of us, their most attractive feature is not their low rates (though that is nice too) but that they never call. If you have an account with Charles Schwab, you may sit down to dinner without expecting the phone to ring with an urgent admonition to sell everything they advised you to buy last week and buy everything they told you to sell, for your own good of course. If you want, Schwab will give you direct access to the market over your modem or touch-tone phone, with no human intermediary at all, like a vending machine for stock purchases.⁵

² See *Davidoff v. Metropolitan Baseball Club, Inc.*, 463 N.E.2d 1219 (N.Y. 1984); *Akins v. Glens Falls City Sch. Dist.*, 424 N.E.2d 531 (N.Y. 1981); *Hunt v. Portland Baseball Club*, 296 P.2d 495 (Ore. 1956); *Leek v. Tacoma Baseball Club*, 229 P.2d 329 (Wash. 1951). See also Walter T. Champion, Jr., "At the Ol' Ball Game" and Beyond: *Spectators and the Potential for Liability*, 14 AM. J. TRIAL. ADVOC. 495 (1991).

³ See Stacy Adler, *Chicago Jury Takes Swing at Cubs*, BUS. INS., Dec. 4, 1989, at 3.

⁴ See *Dewsnup v. Timm*, 112 S. Ct. 773 (1992); *Todd Mason, Lenders Cringe As Judges Chop Mortgage Value*, WALL ST. J., Sept. 26, 1990, at B1.

⁵ Jason Zweig, *A Touch of Class*, FORBES, Feb. 3, 1992, at 82-84 (20 percent of Schwab's trades come in by way of touch-tone systems, 6 percent by modem).

Unfortunately, some creative lawyers have launched an effort to redefine this blessed neglect as negligence. One of them, representing a client who had made very bad investments, successfully filed a claim against Schwab for, as he colorfully put it, letting his client commit financial suicide. It was ruled that Schwab had an affirmative duty to look after his client's interests and should pay for breaching that duty.⁶

If the ruling stands, it is not hard to predict what will happen. Discount brokers will have to monitor their clients' holdings much more carefully and take affirmative steps to get in touch with clients when they see dangerous patterns. Commission rates will go up, and customers will be back to square one, wondering how to separate the sincere advice from the self-interested churning. In effect, consumers will have lost access to a valuable do-it-yourself option.

My point is that it is frequently quite rational to deal with people who are not being especially careful on our behalf, who we expect to be only human, negligent or worse, who might turn out to injure us or stand by while we injure ourselves. We choose to get into the car with a family member at the wheel whom we consider an incompetent driver. We go on doing business with the friendly dry cleaner who breaks our shirt buttons. We let our neighbors take the short cut across our property although they tread carelessly. We return and buy more items from the sharpster antique dealer because, though you cannot trust his sales pitch, his prices are great.

As we forgive others their trespasses, others forgive us. Imagine the chaos in a modern economy if employers insisted on seeking damages against their workers every time they suffered losses from negligence on the job. If you err on the computer and your company's mainframe shuts down for an afternoon, the company is very unlikely to come after you with a claim for business interruption and lost sales, as it might if you were a stranger whose negligence had done the same damage. The shallowness of your pockets is only one reason. Employers rationally recognize that they have a reputation for good will to protect among their employees and that by forswearing their right to recover damages, they are much more likely to attract and keep workers and get their full cooperation on the job. So they are understood to promise to overlook most negligent behavior—or at least to penalize such behavior with no sanction harsher than dismissal.

So it is with all of us: every day of our lives we pre-forgive someone else's injurious, destructive, or even malicious behavior,

⁶ See Michael Siconolfi, *Accountability Is the New Duty of Discounters, Big Board Says*, WALL ST. J., July 19, 1991, at C1.

the better to reassure them that they will not be too sorry for having dealt with us. We give free passes to klutzes and hype artists, reneggers and downright SOBs, agreeing not to push our legal rights against them to a maximum, because we would rather not forego dealing with them at all. And having made our bed, we are willing to lie in it, although others get more than their precise share of the blanket. None of this seems strange except to the modern legal mind.⁷

We are frequently warned of the danger of assuming that people can knowingly take care of themselves and assume risks. That view, we are told, is "atomistic," or suited only to a simpler society; or assumes omniscience on the part of an unwary consumer. In reality, it is urged, most people do not really feel at liberty in their dealings in the market place. They will say that there was no real alternative to applying for a mortgage on such and such terms, or that they were forced to stay at a particular job because no other was anywhere near as suitable, or that they signed a separation agreement under duress because the alternatives at the time of the marital split were just too unpleasant.

Of course there is an element of truth in these characterizations sufficient to provide fuel for discussion. Markets are not perfectly competitive, finding alternatives can be prohibitively bothersome, and emergency situations force people into quick decisions.

But if there is a dot of yin in the yang, a bit of helpless victimization even in the most seemingly voluntary dealings by the sturdiest citizens, so there is also a dot of yang in the yin. Even in the stranger cases, where tort law has always had its greatest intuitive strength, there is commonly a trace at least of consent, agreement, and voluntariness. It is recognized in such traditional doctrines as comparative negligence and especially assumption of risk. In assumption of risk cases there may not be an explicit verbal contract, but there is often a kind of nonverbal signaling. Compare, for example, the Chicago Cubs case with the familiar case where a local stranger stops by to watch an amateur softball game, because it is fun to watch softball games, and is beamed by a foul ball. There is no explicit contract there, no ticket stub like that given out by the Cubs to those who pass through their gate. And yet it is not too

⁷ For one of many examples of the anti-disclaimer view, see WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 282 (1987) ("[I]f we observe a clause disclaiming negligence, the presumption is that the consumer has been deceived. . . ." (explaining why product liability disclaimers are not enforced in today's courts)). Landes and Posner hypothesize that any conduct diagnosed by a court as negligence *ipso facto* flunks a cost-benefit test. They then argue that rational buyers would not voluntarily excuse less-than-cost-beneficial behavior in a seller when the happy alternative is to require it as part of the contract and divide the resulting gains.

hard to see that the spectator moved to the risk and can be said to have voluntarily, if not verbally, evinced a willingness to live with that risk.

Part of our task, then, I would argue, is not only to roll back the intrusion of tort law principles into contractual arrangements, but also to re-import into tort law the contract-like principles that we have kicked out of it. Without some element of consent and mutuality, after all, resorting to law is a simple struggle of all against all, a pure instrument of force and recrimination (albeit perhaps justified) in which people raid each others' stores and demand each others' chastisement.

We read in one book after another that assumption of risk is a dying doctrine, a remnant of the bad old legal regime. Do not believe it. Assumption of risk lives on in the common sense of millions of Americans who go into the back country for a hike, or enter the hospital for an operation, or take out a mortgage, with confident willingness to face a full measure of resulting risk. In speaking to audiences about the litigation explosion, no question comes up as often as this one: people ask, "Whatever happened to personal responsibility?" Why don't people recognize that sometimes they make a bad bargain, or made a bad gamble, and just live with the result? Why do they try to get money by blaming someone else?

The cases that annoy people most are the ones where people are most blatantly trying to evade responsibility. The drunk who fell on the subway tracks in New York and was awarded \$9.3 million.⁸ The would-be suicide who jumped deliberately and was awarded \$600,000 million, her case being less sympathetic.⁹ The lawsuits brought by—as opposed to against—drunk drivers.¹⁰ The case where a woman read a recipe in *Woman's Day* which began, "put a can of soup in the crock pot," and did not realize that she should open and empty the can of soup.¹¹ Apparently she got money; the publishers settled the case.

For some time assumption of risk has been unfashionable among legal theorists. But it has never lost its life among the general public. It is the proper legal reflection of the sense of individual responsibility that has made, still makes, and should continue to make America a great and free country.

⁸ See Calvin Sims, *\$9 Million Won For Loss of Arm In Drunken Fall*, N.Y. TIMES, Sept. 21, 1990, at B3. See also *Ellison v. New York City Transit Authority*, 470 N.Y.S.2d 144 (N.Y. App. Div. 1983).

⁹ *Cowan v. Doering*, 545 A.2d 159 (N.J. 1988).

¹⁰ *Arizona Isn't Immune*, WALL ST. J., July 24, 1990.

¹¹ Larry Bodine, *New Dangers in the Legal Jungle*, MAGAZINE WEEK, Sept. 17, 1990, at 23.